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Supreme Court of the United States

October Term, 1961

No. ...589

EUGENE MEREDITH,

Petitioner.

AGAINST

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court.

Petitioner[1] respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed petitioner's conviction under Title 18, United States Code, Sections 1341 and 2; Title 15, United States Code, Sections 77e (a) (1), (a) (2) and 77x; and Title 18, United States Code, Section 371.

[1] Three defendants are petitioning this Court in this case for writs of certiorari. There is no community of interest between them, and yet their interests are not to be regarded as conflict. They have joined together to pay certain printing expenses common to all of them. They respectfully request this Court to consider the arguments and presentation of each as though made by all wherever and whenever applicable.

The Opinion Below

The Opinion of the Court of Appeals is reported at 274 F. 2d 928. A copy is annexed to the petition of Leo B. Mittelman for a similar writ submitted simultaneously herewith, and we respectfully refer this Court to his petition.

The Grounds of Jurisdiction

The grounds are the same as appear in Petitioner Mittelman's application to which this Court is respectfully referred.

Statutes Involved

The statutes involved are set forth in the petition of Leo B. Mittelman to which this Court is respectfully referred.

Questions Presented for Review

1. Whether the mail fraud counts and the conspiracy count should not have been dismissed because of duplicity and repugnancy.

2. Whether petitioner was not deprived of his rights under Article 6 of the Constitution of the United States because the indictment was vague, uncertain and violated the rules of pleading in the Federal Court.

3. Whether a conspiracy accusation is fair when a score of alleged co-conspirators are joined for the prejudicial purposes of the prosecution; where co-conspirators are held under subpoena and then not used at the trial;

and, where persons are joined in the conspiracy who obviously have no connection therewith with resultant prejudice.

4. Whether, in view of the Government's presentation of the case as a single over-all conspiracy, there was not a fatal variance.

5. Whether petitioner had a fair trial where the trial judge displayed obvious bias against petitioner and his counsel, and usurped the role of the prosecutor.

6. Whether the Court below erred in sustaining the trial court's ruling refusing the defense the opportunity to see the prosecutor's note of interviews with witnesses on grounds violative of the rationale of the *Jencks* cases.

7. Whether, after reversing the conviction of the three broker defendants and acquitting them of the conspiracy charge, the Court below should not have ordered a new trial for petitioners because of prejudicial evidence which came in solely because of the presence of the broker defendants in the case as co-conspirators.

8. Whether the Court erred in the matter of the McCarthy guilty plea.

9. Whether under all the circumstances of the case, petitioner had a fair trial.

Statement of the Case

The indictment is in 50 counts, embracing four categories of crimes. Count 1 is an inter-state wire fraud count.

Counts 2-32 allege a scheme to defraud by use of the mails.

Counts 33-49 allege the use of the mails to sell unregistered Texas-Adams stock.

Count 50 charges a conspiracy to use the mails to sell unregistered Texas-Adams stock.

The allegations of the various counts are more fully described in the Mittelman petition to which this Court is respectfully referred.

Petitioner Meredith is not named in Count 1.

Judgment of conviction was rendered against Petitioner Meredith on June 11, 1960 based on a jury verdict adjudging him guilty on 44 counts of an indictment charging him with mail fraud, substantive violations of the Securities Act, and conspiracy to violate the Securities Act.

Petitioner was sentenced to 5 years imprisonment on one mail fraud count, one securities act count, and the conspiracy count to run concurrently with each other (counts 2, 34 and 50). He was also sentenced to 5 years imprisonment on the duplicative mail fraud and securities act violations counts to run concurrently with each other but consecutively to sentences imposed on counts 2, 34 and 50; execution of sentence suspended and petitioner placed on probation for 5 years to commence upon termination of the prison sentence on counts 2, 34 and 50.

Defendant McCarthy pleaded guilty on the third day of the trial which commenced on February 15th, 1960 and was submitted to the jury more than three months later, to wit: May 23rd, 1960. The transcript covers more than 9,000 pages. Exhibits were countless and complicated.

The guilty plea of McCarthy, its circumstances and prejudicial effect will be discussed later. The complexity of the trial also bears on the issues raised by petitioner.

Petitioner took the stand in his own behalf and testified that he was 42 years old; had had two years of college training; was first in the Coast Guard, shortly after Pearl Harbor; was injured and discharged; became thereafter a Second Lieutenant in the Air Corps Auxilliary on rescue service; and at the time of his discharge was a First Lieutenant.

Petitioner accompanied defendant Pettit to New York in September, 1959. Pettit wanted to go into the mortgage brokerage business in New York. Petitioner had had experience in that business in California, and, he had known Pettit for several years.

In New York they met defendant McCarthy quite by chance. Pettit and McCarthy had known each other from boyhood days. After the usual small talk McCarthy referred to his anticipated take-over of control of Texas-Adams, and invited Pettit into the venture. The mortgage brokerage business did not look promising at that time in New York City, and Pettit expressed interest in McCarthy's proposal, and decided to throw in his lot with McCarthy after some consultation with petitioner who was much struck with the possibilities involved in an association with the fabulous Texas McCarthy oil family. When Pettit agreed to join McCarthy he received assurance that petitioner would be given a job. When the take-over was accomplished, in which petitioner played no part whatever, he was employed as office manager of the Texas-Adams office in New York, and, because the principals were busy all over the country in wheeling and dealing, he was made an officer and di-

rector of the company in order to sign official documents, checks and so forth.

This position and the role assumed by petitioner required him to perform continually and constantly all kinds of routine tasks assigned to him by management. In January of 1956 he was put in charge of the Denver office under the direct supervision of Thomas K. Hudson, Esq., an officer, director and general counsel for the company.

The Court below said: "While the heavy weight of the evidence would seem to indicate that (he) Meredith was a 'follower' rather than a 'leader', this is a far cry from raising a doubt as to lack of criminal knowledge."

This "follower" received consecutive sentences of 5 years under various counts.

Petitioner does not and did not deny that he was extremely active in the affairs of Texas-Adams. His duties required him to be more active probably than anyone else in the matter of signing papers, running errands, signing checks and tending generally to the company's business. But this, too, is a far cry from proof of intent to commit crimes. Petitioner contends that the errors in the case were so many, so flagrant, and so prejudicial that a new trial should be ordered in the interests of justice.

When the Court below acquitted the three broker defendants, it said with respect to certain evidence, otherwise most damaging, that the evidence was "comprised by the fact that Gordon and Co. (owned and controlled by the three broker defendants) bought or sold none of the Empire stock in question and received none of the bonus shares" (p. 2794). In short, the Court below held that since the broker defendants, and their company

were not shown to have profited from the transactions and actions attributed to them by a Government witness, it was not fair to give credence to the testimony of that witness.

It is respectfully submitted that if the same reasoning had been applied to petitioner's activities, he, too, should have been let out by the Court below because the Government failed to prove that he had profited from the frauds attributed to him only by reason of his association with the principals—McCarthy, Crosby and Pettit.

The Court below accepted the Government's theory of a so-called "integrated scheme." It said (p. 2711): "The Government argues correctly that the evidence establishes, basically, a central plan to effect the issuance and sale of worthless or grossly overpriced unregistered corporate securities to an uninformed and deluded investing public."

The proof of the Count 1 scheme covers almost one-third of this gigantic record (J. 157a-286a; 286a-308a; 836a-8a; 851a-4a, 1337a-40a, 1352a-3a and numerous exhibits). Twelve witnesses were called to testify about the manner of its connivance and consummation. During all this time petitioner had to sit by and listen, as did the jury, to the unfolding tale with which petitioner had no connection whatever, and which was pregnant with criminality and prejudice as to him!

The vice of the Government's procedure went further. The indictment alleged that the Count 2 scheme had its origination on March the 18th, 1955. At best Crosby heard of Texas-Adams early in August of 1955 and McCarthy thereafter heard it from Crosby. The gap between March 18th, 1955 and August had to be filled in. And the Government filled it in with all manner of refuse, garbage and dirt. And it is obvious that none of

this, quite apart from relevancy or lack of relevancy, could have had anything to do with petitioner or the Count 2 scheme.

We are referring now to the so-called Homestead-Ajax evidence, the events of which preceded in time McCarthy's involvement with Crosby in the Texas-Adams fraudulent *take-over*.

This evidence was irrelevant, or if even superficially relevant it should have been excluded because of its overwhelming prejudicial effect.

Petitioner, obviously, had nothing whatever to do with these transactions. He had never heard of any of the people involved. He could not possibly have known of these complicated dealings which on their face seem legal enough. What the jury may have thought is another matter.

At least half or more of the trial was taken up with matters with which petitioner had no concern or connection. But he did know or come to know many of the defendants involved and connected with the company. It was inevitable that if the jury thought any of them guilty, then petitioner must also have been guilty because by reason of his duties he was inextricably associated with them.

Passing for the moment any discussion of the possible permissible evidence which the Government may have properly adduced for submission to the jury, it is our contention that the Trial Court gave to the Government unjustifiable and prejudicial latitude in the matter of evidence confusing and collateral and irrelevant, and evidence down-right inadmissible on any possible theory, and extremely prejudicial to petitioner.

Petitioner will in a moment bring to the attention of this Court the nature of such prejudicial testimony. It came in over objection, and was received "subject to connection." There was of course, in several instances the usual and meaningless admonitions to the jury concerning personal guilt, and the usual lip service to the amenities of trial procedure.

The categories of objectionable and prejudicial evidence may be summarized as follows:

1. All the evidence that came in under Count 1.
2. All the evidence relating to the so-called Homestead-Ajax transaction.
3. All the evidence of disparate crimes committed by some of the defendants but which had no relation to the allegations of the indictment.
4. All the evidence relating to the broker defendants who were named as co-defendants, were found guilty by the jury, and, thereafter, acquitted by the Court below for insufficiency of evidence.

It is fundamental that the commission by different defendants of distinct and separate offenses, not arising out of the same transaction, cannot be made the subject of a common trial. *Michelson* v. *United States*, 335 U. S. 469; *Boyd* v. *United States*, 142 U. S. 450; *Harper* v. *United States*, 239 F. 2d 945.

In *Kotteakos* v. *United States*, 328 U. S. 750, this Court said:

> "Here toleration went too far. We do not think that either Congress, when it enacted paragraph 269, or this Court, when deciding the Berger case, intended to authorize the Government to string together, for common trial, eight or more

> separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. * * * The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place."

The principle is peculiarly applicable here. The Government used a dragnet. It threw in everything it could find. It compounded a stinking stew, a veritable witches brew. It named as defendants and conspirators anybody and everybody who had any tangential connection with the transaction. It dragooned every apparently unsavory transaction. All under one umbrella, possible only under the vicious callous reckless shroud of alleged conspiracy.

Petitioner contends that all the evidence which came in under Count 1 should have been excluded because it was not relevant to the central issue raised by the Government's theory of the case. It was a crime in itself.

The same may be said of all the so-called Homestead evidence: all that evidence which had nothing whatever to do with the alleged grand scheme suggested by the Government; or, if it may be said to have had some relevance, the relevance was too remote to justify its admission in evidence. Its sheer weight prejudiced the case against the other defendants.

It is in order to give some further examples of prejudicial collateral evidence. This will be done under the nomenclature used below:

1) "The *Worth Investment Deal*": In this instance defendants McCarthy, Pettit and co-conspirator Hudson

formed a company for a private venture, and diverted $50,000. from the treasury of Texas-Adams for that purpose. The transaction was entirely outside the scope of the alleged conspiracy, and by its very nature precluded knowledge, participation or adoption by the other alleged conspirators.

2) The *Lazy Jay Deal*: In this transaction McCarthy sold to a co-conspirator, Larry Rosen, a parcel of property owned by Texas-Adams, known as "Lazy Jay". Rosen bought the property by secret arrangement with McCarthy pursuant to a pre-arranged sale in Canada for a substantially higher price. He divided the swag with McCarthy (J. 1350a *et seq.*). Here, again, is a transaction having no relevancy to the alleged conspiracy. It was a strictly private, secret off-the-record deal in which none of the other alleged co-conspirators was involved, and was clearly not in furtherance of the alleged conspiracy (J. 1348a *et seq.*).

3) The *Lester Kent Transaction*: This involved a sale of stock by Crosby for cash (J. 1070a-71a) to a customer of Mr. Kent. Incident, however, to this transaction was a lurid account of a proposal by Crosby of highly prejudicial nature (R. 4236-4238).

4) Crosby made many deals with brokers to sell stock under his control, in the United States and Canada. This he did on his own, and for his own personal profit—except when he shared with McCarthy. These deals were made with his close friends of many years Herbert Mann of Foster-Mann, and Harrison Miller of Thompson McKinnon & Company. The deals were secret; the brokerage accounts were for Crosby in the name of Jannis, and the brokers knew it. They assisted Crosby in his schemes to steal, suffered no ill themselves, but profited in commissions and fees.

5) The record is replete with private sales by McCarthy and Crosby of Texas Adams stock for personal profit. These dereliections weighed heavily on the other defendants who were completely unconnected with them. Taken "subject to connection" which was never established, the other defendants had to bear the burden of transference of guilt by alleged conspiratorial association.

These examples do not exhaust the list.

The trial judge seems to have taken it for granted that anything done by a conspirator regardless of its relation to the conspiracy was chargeable against the alleged co-conspirators. This is, of course, not the law.

It was Judge Hand who said in *United States* v. *Peoni*, 100 F. 2d 401, 403 (C. C. A. 2d, 1938):

> "At times it seems to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators including the declarations of later entrants is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy, though that doctrine too is often abused."

Kotteakos is a striking case historically. But it is merely a special instance of a well grounded rule that

prejudicial collateral matter may not be introduced into a case, though possibly relevant, if the overall result is to prejudice a defendant's substantial rights. Error thus committed opens the record, and places the burden on the government to show "harmlessness".

The trial judge extended to the limit the Government's use of all the tricks and devices which have brought mass conspiracy trials under condemnation. Because of the extreme latitude improperly and unfairly extended to the Government, appellant's substantial rights were prejudiced.

Even if the evidence be deemed relevant to any issue properly raised by Counts 2 and 50, it should have been excluded nevertheless because its prejudicial nature outweighed its remote and tangential relevance. *United States* v. *Krulewitch*, 145 F. 2d 76 at 80 (C. A. 2, 1944).

See also *Moore* v. *United States*, 150 U. S. 57, 60-61 (1893); *Boyd* v. *United States*, 142 U. S. 450 (1892); 1 Wigmore on Evidence 29 A. 42, 55, 1904.

Is there to be no restriction or limitation upon the privilege of the prosecution to take the greatest diversity and multiplicity of conspiracies and crimes, arbitrarily designate them as a single conspiracy, and depend upon this Court's decision in the *Bayer* case for sanction and absolution? Clearly a point is reached where a jury is first impressed and finally overwhelmed by the very bulk of the inculpatory evidence against a seemingly endless succession of co-defendants. The reasonable doubt that the jury might have entertained of the guilt of a particular individual can hardly be expected to withstand the ever incoming tide of incriminating testimony against the host of defendants, particularly when the jury is admonished that the acts of each defendant is bound by the acts and declarations of all. Under said circumstances,

can it reasonably be expected that a jury will properly allocate the proof? The answer must be in the negative.

No one can tell what item of evidence ultimately moved a jury to reach a certain conclusion. On the other hand, and far outweighing all of the foregoing reasons for permitting this basically improper procedure, is the effect of the rule on accused persons. An impecunious defendant charged in such a gigantic conspiracy, usually finds himself unable to retain experienced counsel, because it becomes obvious, from a mere examination of the indictment, that the trial of the issues will take a long time. Secondly, in the event of a conviction, appeals to the Circuit Court of Appeals become almost impossible, because many persons, unable to take a pauper's oath, are nevertheless put into the position where it is impossible for them to perfect the record and present the questions to the Circuit Court.

The basic issue presented by this case concerns the proper limitation upon the use of a conspiracy charge to deprive persons accused of crime of their fundamental right to be free of mass trial. This does not relate merely to naming numberless persons as defendants, but countless others as co-conspirators who have no relation whatever to the central conspiracy, but who are brought into the case for prejudicial effect and prejudicial purpose. The government should not have the windfall of prejudicial and inadmissible testimony against each defendant because of a charge of conspiracy.

It hardly needs elaboration that this type of issue is one which this Court has itself recognized as worthy of certiorari on many occasions. In *Grunewald* v. *United States*, 353 U. S. 391, 404, Mr. Justice Harlan wrote: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the al-

ready pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not again be detailed." He cited, as illustrative cases, *Delli Paoli* v. *United States*, 352 U. S. 232; *Lutwak* v. *United States*, 344 U. S. 604; *Krulewitch* v. *United States*, 336 U. S. 440; and *Bollenbach* v. *United States*, 325 U. S. 607.

This case represents further drift in "the long evolution of that elastic, sprawling and pervasive offense" of conspiracy.

The Court below not only reversed the convictions of the Gordon group, the three so-called broker defendants, but it acquitted them without ordering a new trial for the other appellant. Standing as defendants and co-conspirators before the jury, much prejudicial evidence came in against them which affected the interests and rights of all the other defendants. A great deal of it would have been inadmissible but for the relaxed rules of evidence where conspiracy is involved. It is proper to speculate that the jury gave weight to this testimony because the jury found these defendants guilty, and the Government in the Court below argued strenuously that this evidence established their guilt. It is not proper, on the other hand, to speculate that the jury gave it no weight.

See the recent *Schaffer* decisions in this Court, and the Court below (266 F. 2d 435; 362 U. S. 511).

Substantial error was committed in the way the trial Court handled the McCarthy guilty plea, and its aftermath. The Court is respectfully referred to Mittelman's petition on that point.

The prosecutor's handling of Government witness Greenberg is also a source of genuine complaint because the cross-examination which the trial Court permitted the prosecutor, was based on a false claim of surprise.

Petitioner took the stand in his own defense, and immediately the Trial Court displayed its bias and made a fair trial for petitioner impossible. Fairness is merely a synonym for impartiality. And impartiality is the highest duty of a judge. The prejudicial consequence of impropriety by a trial judge hardly requires exposition. It destroys the protective shield of judicial impartiality, which ensures impersonal and equal treatment, courteous consideration of all arguments, dispassionate and objective rulings, fair comment on the evidence to the jury, and, in case of conviction, a just sentence. Before the jury, it directly diminishes the stature, dignity and integrity of counsel; and indirectly discredits his client.

Where, as here, the prejudicial unfairness is manifest, no other consideration can cure it and save the judgment of conviction from reversal. Nor can any other course defend and preserve the integrity of the judicial process.

We do not believe that a reading of this record will show that the trial judge measure up to the requirements of his office.

The direct testimony and cross-examination of petitioner will be found in the joint appendix at pages 1616-A through 1696-A.

It would lengthen this petition unduly to quote the record with respect to the improper conduct of the trial judge. He virtually took over the conduct of the cross-examination. There is scarcely a page which does not show his interposition into the case as the prosecution's arm of the Government. By gesture, tone of voice and emphasis he left no doubt in the jury's mind of his low

opinion of petitioners and his exculpatory testimony. He made mountains out of molehills. He swung around in his creaking chair and turned his back on petitioner whenever petitioner scored a point. He ridiculed petitioner's counsel. The record must be read to be believed. If the Court will read the 40 pages between J. 1646-A and 1682-A, we are satisfied that we will have made our point.

This is not a case where a judge properly seeks to clarify answers. In this case the judge assumed the role of prosecutor, and foreclosed the possibility of a fair consideration of petitioner's evidence by the jury.

Reasons for Allowing the Writ

1. The failure to dismiss the indictment violated petitioner's constitutional rights under the 6th Amendment because it did not have the clarity and specificity required by the Amendment.

2. In sustaining the denial of the motion to dismiss the indictment prior to trial for the reasons given by the Court for duplicity and repugnancy, the Court below decided a question of criminal law in conflict with principles of law established by custom and right for the protection of the individual citizen.

3. The trial Court adopted a procedure which nullified this Court's ruling and instruction in the Jencks Act cases. It is necessary now in the light of the tactics employed by prosecutors, to review and lay down new "ground" rules in order to assure defendants in criminal cases opportunity to defend themselves.

4. This Court should decide as a matter of first instance whether a convicted defendant is entitled to a new

trial: (a) where evidence against a co-conspirator is received subject to connection and the co-conspirator is subsequently acquitted by a higher court; (b) where but for the presence of the subsequently acquitted defendants, prejudicial evidence would have been inadmissible; and (c) where said evidence was in any event clearly prejudicial.

5. The Court below has decided important questions of Federal Criminal Law in conflict with principles set forth by this Court in *Kotteakos* v. *United States*, 328 U. S. 750 and *United States* v. *Krulewitch*, 145 F. 2d 76.

6. This Court should allow this writ because petitioner was denied a fair trial.

Taken all together, we submit, the matters aforementioned prevented petitioner from having had a fair trial.

CONCLUSION

It is respectfully submitted that this Court should issue the Writ prayed for.

Respectfully submitted,

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